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# BEYOND IDR: RESOLVING HOSPITAL DISPUTES AND HEALING AILING ORGANIZATIONS THROUGH ITR

ORNA RABINOVICH-EINY<sup>†</sup>

## I. INTRODUCTION

In early July of 2006, yet another scandal regarding professional and ethical standards in Israeli hospitals broke out: it was revealed in *Haaretz*, Israel's most influential newspaper, that a series of experiments in women and the elderly were conducted at several major Israeli hospitals without obtaining patient informed consent and approval by the appropriate authorities.<sup>1</sup> A couple of weeks earlier, the same paper published a cover story in its weekend magazine on allegations of medical malpractice in the treatment given to the wife of a senior physician at the hospital where he works.<sup>2</sup> The incident was followed, he claimed, by a series of cover-ups and attempts to silence discussion of what had happened. He now walks the corridors of his hospital feeling that he must speak up against what he perceives as the systematic cover-up of medical malpractice cases and the absence of any effort to learn from past mistakes.<sup>3</sup>

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<sup>1</sup> See Ran Resnik, *Illegal Experiment in Dozens of Women with Diabetes Conducted in Meir Hospital*, HAARETZ, July 5, 2006, at 5.

<sup>2</sup> See Ran Resnik, *Doesn't Believe in Doctors*, HAARETZ, June 23, 2006, at 11.

<sup>3</sup> See *id.*

These are seemingly two isolated events. In fact, they are not. As this article will demonstrate, these incidents are representative of a much broader problem that extends beyond the scope of individual misconduct or negligence. I believe that these occurrences are indicative of the absence of effective channels of communication within these institutions, which, in turn, fosters misunderstandings and mistakes, escalates conflict, encourages defensive treatment of complaints, and masks incompetence and wrongdoing. I term this predicament organizational ailment. Obviously, this problem is not unique to the healthcare arena, but it is prevalent and visible in the medical setting because of the complex and high-pressure reality in which decisions need to be made, and the often fatal consequences of mishaps there. Hospitals are hierarchical institutions in which the most quotidian decisions could be issues of life and death and are reached based on coordination among a diverse group of practitioners and under extreme time pressure and financial constraints. In Israel, this reality is further compounded by an industry in which the operator of the major hospitals, the Ministry of Health, is also the regulator and monitor of their functioning.

The American experience with "internal dispute resolution"<sup>4</sup> ("IDR") or "conflict management systems"<sup>5</sup>—that is, the development of internal, systemized capacity for handling conflict within organizations—has proven that, in certain cases, these mechanisms can be instrumental in remedying organizational ailment. Problems, complaints, and conflicts are very much like pain. They signal a problem that needs to be addressed. Ignoring the problem, or "lumping it," may work in the short term, but inevitably fails in the longer term. Problems will eventually surface, and when they do, they will be of such scale that harm and cost to all involved are magnified dramatically. This paper suggests that a particular IDR model, which I term internal transformative resolution ("ITR"), could provide more satisfactory, often speedier and less costly,

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<sup>4</sup> See generally Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993) (discussing the phenomenon).

<sup>5</sup> See DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* (2003).

resolutions to individual complaints as well as help organizations function in a healthier manner by engaging in ongoing dialogue with the various stakeholders and proactively addressing problems.

The Israeli dispute resolution landscape, despite generally following the American experience with institutionalized ADR (mediation in particular) in the courts, has not made, to date, any significant strides with respect to IDR. This paper demonstrates, through the case study of hospital disputes, the benefits of a particular form of IDR, that of ITR systems, and the ways in which this specific model is able to address some of the perils associated with IDR. I begin with some background on dispute resolution in Israel, the forces that have shaped the dispute resolution landscape there, and the reasons for the dearth of IDR in Israel. I then turn to the ITR model and explain the ways in which it can help organizations handle disputes more effectively than other routes for dispute resolution, both on an individual and organizational level. One of the most promising aspects of having an ITR system is that it allows hospitals (as it does other organizations) to detect patterns of disputes and change the organizational communication culture, thereby acting in a preventative capacity. This model has the further advantage of addressing some of the harsh critiques voiced against IDR systems. Then, in light of the benefits offered by ITR systems, I address the question why hospitals have refrained from adopting these systems voluntarily. I conclude that the existing institutional and legal environment actively discourages any effort for information gathering, quality control, and improvement in the medical arena, the driving force behind ITR systems. Last, I offer some thoughts on future direction for changes in the legal environment that would provide incentives for Israeli hospitals to develop ITR systems.

### I. DISPUTE RESOLUTION IN ISRAEL

Mediation was formally institutionalized in Israel in 1992, with the amendment of the Courts Law of 1984.<sup>6</sup> The amendment granted courts the authority to refer civil disputes to mediation or arbitration with party consent. Soon thereafter,

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<sup>6</sup> Courts Law (Consolidated Version), 1984, S.H. 198, §§ 79B, 79C.

regulations<sup>7</sup> were enacted that determined the scope of confidentiality, the prerequisites and training requirements for mediators, and mediator duties and responsibilities. An already existing Arbitration Law from 1968<sup>8</sup> would govern court-referred arbitration sessions.

Prior to the formal institutionalization of ADR, there was only limited experience with arbitration and conciliation, all of which was concentrated in the organized labor setting.<sup>9</sup> Only in the post-1992 era was ADR perceived as a real alternative to litigation. The rhetoric was one of "revolution," and the overly clogged legal system gladly embraced the promise of relief.<sup>10</sup> But, the promise soon turned to disappointment, and much like the evolution of modern ADR in the United States several decades earlier, proponents of ADR and of mediation in particular, came to realize the price exacted by formalization. Those qualities for which mediation was heralded—the opportunity for direct party participation, party control over the process and outcome, the quotidian language of proceedings, and the ability to look at broader, root cause problems and devise creative, tailor-made resolutions—were gradually lost.<sup>11</sup> The result was the dominance, indeed hegemony, of one form of mediation: evaluative mediation.

The near exclusivity of evaluative mediation is unfortunate since it has reduced a field renowned for its diversity into a flat, one-dimensional process. While ADR was imported to Israel in its institutionalized form, the American experience has been far more diverse. In fact, the emergence of modern day mediation can be traced to three different origins of the ADR movement in the United States—the quest for community empowerment, an attempt to revamp the courts by reducing the caseload and enhancing efficiency, and cultural changes in the business world that led to a broader realization that in certain settings, mainly those where parties have an ongoing relationship, there is a

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<sup>7</sup> Courts Regulations (Mediation), 1993, KT 5539, 1042; Courts Regulation (Mediation), 1996, KT 5766, 1325.

<sup>8</sup> Arbitration Law, 1968, S.H. 184.

<sup>9</sup> See Mordechai Mironi, *Innovations in Negotiation and Dispute Resolution in the Workplace*, 3 LAW & BUS. 75, 80–84 (2005).

<sup>10</sup> See Aharon Barak, *On Mediation*, 3 SHA'AREI MISHPAT 9 (2002).

<sup>11</sup> I have conducted numerous conversations with practitioners and policy makers in the field that support this conclusion. For the state of institutionalization in the United States, see *infra* notes 26–27 and accompanying text.

need for interest-based or transformative dispute resolution processes.<sup>12</sup> These varying sources have generated three distinct schools of practice in the mediation world: facilitative, evaluative, and transformative mediation.<sup>13</sup> Narrative mediation, a fourth discipline, has recently gained momentum and represents a post-modern, culturally-based understanding of conflict.<sup>14</sup> The distinctions among these schools are real and involve differing definitions of success and its evaluation and of the mediator's role (and therefore the required education and training to become a mediator as well as what constitutes legitimate intervention by a certified mediator).

Evaluative mediation, generally speaking, is a process in which the mediator provides the parties with an evaluation of what a court would decide if the case were brought before it. Such a process takes place in the shadow of the law, and presumes to echo the resolutions that would have been reached in the formal system, albeit more efficiently because of the procedural flexibility, the confidentiality, and simplicity of the proceedings.<sup>15</sup> An evaluative mediator is, therefore, dominant, active, and intrusive. Such a mediator tends to meet with parties separately and the mediation often turns into a form of "shuttle diplomacy" during which the mediator searches for a numerical figure or "package" that would be acceptable to all parties.<sup>16</sup>

The facilitative approach, on the other hand, views the evaluative mediator as being overly dominant. Even though this approach views the resolution of the dispute as an explicit goal of the process, it places limits on the measures taken by mediators. Mediators are expected to act as facilitators of communication

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<sup>12</sup> See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 168-85 (2003).

<sup>13</sup> See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 102-04 (2005) (describing transformative mediation); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13-34 (1996) (discussing the two basic approaches to negotiation—"adversarial" and "problem solving"—as well as the "facilitative" and "evaluative" approaches to mediation).

<sup>14</sup> See generally GERALD MONK & JOHN WINSLADE, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000).

<sup>15</sup> See Riskin, *supra* note 13, at 26-27.

<sup>16</sup> See *id.* (noting that most evaluative mediation takes place in private caucuses where the mediator gathers information and deploys evaluative techniques such as proposing solutions).

between the parties by exposing the interests that underlie parties' stated positions. Proponents of facilitative mediation claim that this approach typically generates creative and optimal resolutions for the parties.<sup>17</sup>

A third mediation school, transformative mediation, differs dramatically from the previous approaches. While both evaluative and facilitative mediation can be termed "problem-solving" in that they view the conflict as a problem that needs to be fixed, transformative mediation views conflict as an opportunity for moral growth from a relational perspective. The fathers of the transformative approach are Bush and Folger, who published in 1994 their seminal book entitled *The Promise of Mediation*.<sup>18</sup> To Bush and Folger, the goal of a mediation process is not to reach a resolution necessarily. A successful mediation is one in which the parties experienced learning, moral growth, and transformation.<sup>19</sup> Such a mediation contains two elements: empowerment and recognition. Empowerment means that parties are strengthened by learning to face certain difficulties through reflection, choice, and deliberate action.<sup>20</sup> Recognition has to do with the ability to understand or recognize the other. This is realized by acknowledging and strengthening the inherent human ability to experience and express concern for the other, in particular those whose condition is "different" than their own.<sup>21</sup> Therefore, both empowerment and recognition can be reached irrespective of the ultimate outcome of the process, and reaching an agreement is not the primary goal of transformative mediators.<sup>22</sup>

Finally, narrative mediation differs from the preceding schools in that it situates the parties' dispute and their conflicting accounts within a broader cultural context. Culture—not interests or their relationship with other individuals—shapes individual perspectives and understandings.<sup>23</sup> To understand

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<sup>17</sup> See Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939–43 (1997).

<sup>18</sup> See generally BUSH & FOLGER, *supra* note 13.

<sup>19</sup> See *id.* at 73, 81.

<sup>20</sup> See *id.* at 13.

<sup>21</sup> See *id.* at 14.

<sup>22</sup> See *id.* at 52.

<sup>23</sup> See generally Monk & Winslade, *supra* note 14; see also Toran Hansen, *The Narrative Approach to Mediation*, 4 PEPP. DISP. RESOL. L.J. 297, 300 (2004) ("Narrative [m]ediation . . . [is] sensitive to . . . cultural meaning-making systems,

each party's perspective, we need to locate their individual story in the broader, dominant narrative. These narratives, however, constrain parties' ability to understand one another, and the mediator's role is, therefore, to help the parties build a counter-narrative in which diversity and a broad range of perspectives are tolerated.<sup>24</sup> The mediator, then, is not a distant neutral, but is actively engaged in deconstructing the dominant narratives and in generating an alternative one. While there are real differences between transformative and narrative mediation, they are not antagonistic to one another. The transformative model, building on the insights of the narrative model and other developments in the field, can and should address broader cultural issues through its quest for recognition. Indeed, the broad transformative model proposed in this article draws on the insights afforded by narrative mediation while avoiding some of the dangers associated with the active role narrative mediators play.<sup>25</sup>

As stated above, the Israeli and American experience with mediation has been that institutionalization of mediation within the formal system leads to dominance of the evaluative mediation school.<sup>26</sup> Many mediation proponents have viewed this as a troubling development.<sup>27</sup> Since the evaluative school fosters a legalistic rights-based process, it runs counter to mediation's promise for a qualitatively superior process to litigation through greater party control and satisfaction. While presenting a more efficient alternative to lengthy litigation (a claim also contested by some), evaluative mediation foregoes many of the protections offered to weaker disputants through the formal system. We are

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[and] elicits and draws upon the clients' worldviews in seeking 'local expertise' and resolutions.").

<sup>24</sup> *Id.* at 302 ("The narrative approach recognizes the role of the mediator and the mediation have within the conflicting stories of the parties and considers the implications of how their identity... and the physical setting will impact the conflict narratives of the parties.").

<sup>25</sup> See *infra* note 74 and accompanying text.

<sup>26</sup> For a discussion of the state of institutionalization of mediation in the United States, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do with It?*, 79 WASH. U. L.Q. 787, 788-816, 838-61 (2001). The description of the Israeli experience is based on conversations with practitioners and policy makers in the field.

<sup>27</sup> See generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991) (exploring the difficulties inherent in implementing ADR strategies within the rigid legal culture).



left, then, with a process that leaves out the best of the formal and informal arena, a pale version of what mediation advocates envisioned.

Why, then, has evaluative mediation prevailed? Several factors have joined together to make evaluative mediation the dominant form of mediation employed in the resolution of disputes both in Israel and in the United States. These factors include the stage in which disputes were referred to mediation (post legal claims, after attorneys were employed and parties' claims had already been morphed into legal positions and monetized), the rationale for the institutionalization of ADR (mainly making the court system more efficient by reducing its heavy backlog), the criteria for referral of cases to mediators (those who have had past success, *i.e.*, have high resolution rates) and, perhaps most strongly, the sharp contrast between the other forms of mediation (facilitative, transformative, and narrative), and the adversarial frame of mind that is deeply engrained in the system and its key actors (judges, lawyers, and court administrators charged with referral to, and evaluation of, mediation services rendered).<sup>28</sup>

Despite the dominance of institutionalized mediation in recent decades and the supremacy of evaluative mediation in the institutionalized setting, other forms of mediation have emerged over the years in non-court settings in the United States. In particular, there are successful examples of the use of different mediation models by a variety of organizations (such as the USPS,<sup>29</sup> Brown and Root,<sup>30</sup> and PECO<sup>31</sup>) in the pre-litigation phase.

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<sup>28</sup> See Welsh, *supra* note 26, at 805-09 (discussing the preference for evaluative interventions in court-connected mediation); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 153-64 (1999) (discussing the differentiated roles of lawyers as traditional adversarial advocates, problem solvers, mediators, and protectors of society).

<sup>29</sup> See generally James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESSTM Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001) (lauding the impressive results achieved by the USPS REDRESSTM program); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS & TM Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001) (describing the USPS's "Resolve Employment Disputes Reach Equitable Solutions Swiftly" program as an implementation of transformative mediation).

<sup>30</sup> See Mironi, *supra* note 9, at 91-97.

<sup>31</sup> See LIPSKY ET AL., *supra* note 5, at 148-50.

The emergence of innovative conflict management systems in American organizations can be attributed to several causes, which include the recognition that these mechanisms can actually prove beneficial to the organization,<sup>32</sup> and the growing dissatisfaction with courts' handling of disputes on the one hand,<sup>33</sup> and with such formal alternatives as the EEOC on the other.<sup>34</sup> In addition, the adoption of the Administrative Resolution Act in 1990 requiring federal agencies to consider use of ADR has spurred the use of alternatives in the public sector.<sup>35</sup> Even though the private sector in the United States is still far behind in terms of its conflict management systems, there nevertheless is a share of private companies that have experimented with IDR and adopted innovative internal systems.<sup>36</sup> Lipsky, Seeber, and Fincher, in their insightful book on conflict management systems, describe how globalization and increased market competition are among the factors that have led to the adoption of IDR by American corporations.<sup>37</sup>

In Israel, there is no legislation requiring the adoption of ADR mechanisms, aside from the regulations that allow for court-referred mediation in the post-legal claim stage. In addition, Israeli companies have been slower to realize the gains qualitative improvements in the workplace hold for them<sup>38</sup> and have, to a large extent, embraced the backlogged and expensive court system in a reality in which few incentives for improvement and dispute prevention exist.<sup>39</sup>

This paper argues that addressing institutional ailment requires effective communication and ongoing systematic efforts for quality control. Effective communication is enhanced through

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<sup>32</sup> See *infra* Parts III.A–III.B.

<sup>33</sup> See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 100–01 (2000).

<sup>34</sup> See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 307–16 (2001) (criticizing the Equal Employment Opportunity Commission's inefficacious design, backlog of cases, and lack of enforcement power).

<sup>35</sup> See LIPSKY ET AL., *supra* note 5, at 305.

<sup>36</sup> See *id.* at 114–15, 147–52.

<sup>37</sup> See *id.* at 32.

<sup>38</sup> Research has shown that Israeli managers focus on short-term success, rely on power as a significant force in their work, and avoid empathy, tolerance, and forgiveness. See Einav Ben Yehuda, *Who Is the Israeli Manager? Focused on Results, an Entrepreneur at Heart, Does Not Provide Feedback*, HAARETZ, May 1, 2006, at 30.

<sup>39</sup> See *infra* Part IV (noting the reluctance among Israeli hospitals to proactively adopt conflict management systems regardless of the benefits such systems afford).

the integration of broad transformative mediation<sup>40</sup> into the organization. Quality control, on the other hand, is attained through information gathering, analysis, and monitoring. To that end, this article proposes an internal conflict management system that meets three criteria: it is holistic, transformative, and structurally accountable. In developing this model, which I refer to as ITR (internal transformative resolution), the paper brings together the literature on IDR and mediation with the literature on accountability in ADR as a necessary first step<sup>41</sup> in developing a comprehensive model for accountable ITR systems. This system is described and justified in the following sections. Although much of what is said regarding ITR in hospitals could be applied to other types of organizations, the health care setting provides a particularly apt environment for experimenting with this model: it is driven by a decisive and authoritative culture; it is an arena in which providers operate under severe monetary and time constraints, and a context in which major power imbalances exist between disputing parties. Therefore, as further explained in the next section, the problems that arise in this setting tend to be "complex," requiring creative avenues for redress.

## II. THE PROMISE OF ITR: FOCUS ON HOSPITAL DISPUTES

### A. *The Need for an Internal Capacity for Handling Conflict*

Hospitals are fraught with disputes.<sup>42</sup> Typically, a distinction is drawn between internal and external disputes. Internal disputes are conflicts among hospital employees or between the hospital and its employees. They can range from relatively simple disputes over a parking spot to such complex matters as discrimination or harassment claims. Discrimination and harassment disputes are common in a setting that is not only hierarchical but whose workforce composition reflects and accentuates existing societal power structures, as is the case in

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<sup>40</sup> See *infra* note 74 and accompanying text.

<sup>41</sup> I am currently involved in an empirical research project for developing an internal capacity for dispute resolution and prevention at one Israeli hospital. This setting (and potentially others) will provide the necessary additional layers to the development of such a model.

<sup>42</sup> See NANCY N. DUBLER & CAROL B. LIEBMAN, *BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS* 10 (2004).

hospitals with an overwhelming majority of white male doctors (who also staff top management positions) and mostly women and minorities serving as nurses and administrative staff.<sup>43</sup> The structure of the already segregated workforce is reinforced by a communication culture that breeds stereotypical decision-making and serves to discriminate, even absent intent to do so.<sup>44</sup>

External disagreements are conflicts between the hospital or its staff and patients and their families. In external disputes,<sup>45</sup> one can distinguish between disputes over the quality and scope of medical care given and bioethics disputes. The first type of disputes range from complaints regarding the behavior of the medical team to the quality of medical care (which often takes the form of a malpractice claim). The structure of the environment (a hierarchical organization in which decisions need to be made by a diverse care team with respect to complex problems) is prone to miscommunication, partial information, and mistakes. Even where medical intervention is appropriate, the high-pressure setting in which extreme power imbalances exist between the medical staff and the patient can generate misunderstandings, frustration, and mistrust, which, in turn, yield conflict. The second category of external disputes relates to bioethics dilemmas, and has to do with the allocation of scarce resources, death and dying, the suspension of care, the interaction of the family and the health care provider, and medical ethics. In this context, the complexity of the prognosis and morbid nature of decisions has made miscommunication among the medical team, patients, and their families all the more prevalent.<sup>46</sup>

The terminology may sound confusing, but the question of whether a dispute is defined as "internal" or "external" is of marginal significance in determining whether a dispute should

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<sup>43</sup> See AM. MED. ASS'N, TABLE 1—PHYSICIANS BY GENDER (EXCLUDES STUDENTS) (Feb. 7, 2006), <http://www.ama-assn.org/ama/pub/category/12912.html> (reflecting changes in the percentage of female doctors over the years, which, despite increases, remains substantially lower than that of male doctors).

<sup>44</sup> See *infra* note 76 and accompanying text.

<sup>45</sup> In this article I do not address disputes with health plans (such as disputes between doctors and health plans over inclusion or between patients and health plans regarding the extent of coverage given). These types of disputes raise questions that extend beyond the internal communication culture within hospitals and, therefore, are beyond the scope of this article.

<sup>46</sup> See DUBLER & LIEBMAN, *supra* note 42, at 5.

be resolved through internal dispute resolution mechanisms.<sup>47</sup> Rather, the essence of the problems that an organization faces, in particular their complexity, are what should determine the scope of disputes to be handled internally. Complex problems result from a combination of factors that are not easily discernible, and are often the product of unintentional acts or thought processes. In light of these traits, formal law has been unsuccessful in addressing these types of problems. In the hospital context, both internal and external disputes tend to be complex, and there are, therefore, clear advantages for the parties involved, as well as the hospital, in resolving the problem through the use of internal mechanisms in general, and ITR specifically, over other routes.<sup>48</sup>

Advocates of ADR typically mention such benefits as the cost of the proceedings,<sup>49</sup> flexibility, the degree of control parties have over process and outcome, confidentiality, and the ability to maintain privacy and reputation, all of which have served to make these processes—mediation in particular—more satisfactory<sup>50</sup> and effective.<sup>51</sup> When ADR is offered through embedded, in-house systems, these advantages are even more pronounced. Barriers to raising disputes are further lowered—the systems are at least partially funded by the hospital and the availability of internal, confidential, and flexible conflict management systems allows sensitive complaints (that would not have been raised otherwise) to surface, thereby expanding the scope of grievances that mature into claims.<sup>52</sup> For employees who have experienced harassment, patients who have a sensitive medical condition and doctors, nurses, and hospitals for whom

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<sup>47</sup> One reason for upholding the distinction between internal and external disputes and confining the scope of internal dispute resolution systems to the former could be the degree of trust and level of comfort an external party would have in having their dispute with the hospital handled by an internal entity. Nevertheless, there are measures that could mitigate the trust and legitimacy problem, such as adopting measures that ensure the independence of the internal unit and the transparency of its workings.

<sup>48</sup> There are also serious challenges and disadvantages associated with private dispute resolution—problems described in *infra* Part III.C.

<sup>49</sup> See Carol A. Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, 578 PLI/LIT 747, 750–51 (1998).

<sup>50</sup> See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 895 (1997).

<sup>51</sup> See LIPSKY ET AL., *supra* note 5, at 77–78; Edward A. Dauer, *The Future of ADR*, 1 PEPP. DISP. RESOL. L.J. 3, 7 (2000) (mentioning some of ADR's benefits).

<sup>52</sup> See Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOT. J. 161, 165 (1990).

the public airing of a dispute may cause irreparable harm to their reputation, mediation provides an attractive and satisfying alternative. In addition, when mediation is offered in-house, intervention takes place at an early stage, before the dispute has been framed in legal terms and escalated by adversarial presentation, and therefore the likelihood of a resolution being reached increases.

For the hospital, the costs saved through mediation are significant, not only in terms of direct costs (attorneys' fees, court fees, money judgments) but also in terms of employee morale, productivity, and stability when the hospital is not involved in the prolonged public airing of disputes.<sup>53</sup> When a hospital or its employees are engaged in litigation, employee morale and work production often drop—a phenomenon that extends beyond the particular employee or employees involved in the proceedings. Experienced employees may switch jobs, generating costs related to training new employees, and high quality candidates may choose to apply elsewhere.

In addition, internal conflict management systems allow for much greater flexibility than litigation in choice of remedy. It turns out that the remedies offered in medical malpractice cases by the courts have often been inadequate in addressing complainants' needs and interests. Research has shown that that the aggrieved patient or her family members often seek closure, an explanation, or an apology rather than damages.<sup>54</sup> It seems that if patients had an opportunity for a conversation with the care team early on, many of these cases would not reach the court system, a phenomenon that raises the costs of healthcare and generates defensive medicine.

The greatest advantage an internal conflict management system holds over courts and ad-hoc ADR is the unit's contribution to organizational improvement and learning. By allowing problems that would not have been raised through formal legal channels—either because of the lack of confidentiality or because the problems themselves do not fit familiar

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<sup>53</sup> See LIPSKY ET AL., *supra* note 5, at xii–xiii.

<sup>54</sup> See Ann J. Kellett, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 J. DISP. RESOL. 111, 124 (1987) (stating that the motivating force behind much malpractice litigation is patient hurt and anger, not the pursuit of money damages; often, "[w]hat they really want is a chance to be alone in the room with the defendant doctor for about fifteen minutes" (internal quotation marks omitted)).

legal rubrics—to surface, IDR helps uncover matters that disrupt the workplace and affect the quality of the organization's services and its reputation. Therefore, a nurse's claim that she was harassed by one of the doctors, or a complaint by a family member<sup>55</sup> that the patient was treated insensitively, which quite possibly would not have been made absent an informal, confidential channel for dispute resolution within the hospital, allows the organization to detect problems at an earlier stage.

More importantly, the insider status afforded to the unit or individual in charge of dispute resolution creates a system that has a "memory" and is therefore capable of recognizing aggregate patterns that emerge from the individual cases. Individual harassment claims by members of certain groups (for example, doctors) can become indicative of an even broader systematic problem relating to such matters as the screening of candidates in the hiring process, the need for training and policies on these issues, and the need to diversify the workforce.<sup>56</sup> Similarly, what seem like sporadic and unrelated instances of insensitivity to patients and their families could indicate the lack of clear guidelines on particular issues, and individual malpractice complaints may in fact indicate there is a problem with training, supervision, or communication among hospital workers or with the patient and her family. This is one of the most significant aspects of internal dispute resolution mechanisms—this is what distinguishes them from the external delivery of ADR services and what makes them attractive for organizations. By creating an internal pool of past complaints and building a capacity for identifying troubling patterns, certain internal dispute resolution

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<sup>55</sup> Disputes between hospital staff and patients or their family can relate to the manner in which treatment was given, the level of communication about treatment, and the degree of sensitivity and care that was experienced by the patient and her loved ones. Pressure, lack of sleep, and long shifts on both sides can result in grievances that escalate and impact the way in which patients perceive the quality of care rendered. The formal system may fail to recognize such grievances as constituting legal claims. Nevertheless, the resolution of these grievances is significant to a hospital's reputation, particularly in an era in which consumers are increasingly empowered vis-à-vis large institutions through internet communication. See Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1, 20–22, 27 (2003–04).

<sup>56</sup> See Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 279 (2006); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 503–04, 520 (2001).

systems can move beyond the resolution of individual disputes and achieve *ex ante* prevention.

Beyond general organizational trends, the embedded position of the dispute resolution unit can also reveal patterns regarding its own functioning.<sup>57</sup> Because it is based in the same organization, similar disputes tend to arise. This allows the dispute resolution group or individual group members to draw more general lessons on the nature of their own interventions—what worked, what did not, and why. The insider perspective, can, when the system is properly designed, drive both the organization and the dispute resolution team within the organization to learn from past experience and strive to improve the way that they function.

The ability to follow and study trends is most important in those areas in which the formal legal system has not been able to eliminate unwanted phenomena through the regulation of individual conduct. There is reason to believe that in certain domains and under certain conditions, internal dispute resolution mechanisms—precisely because of all the ways in which they are different from both courts and external ADR—may actually be better vehicles for change within organizations.<sup>58</sup>

Courts have proven less than optimal in handling such complex phenomena as subtle workplace discrimination<sup>59</sup> and medical malpractice.<sup>60</sup> Similarly, the top down, rights-based approach has proven wanting in addressing bioethical dilemmas.<sup>61</sup> It seems that in order to effectively address problems in these areas and prevent future occurrences from taking place, a dispute resolution avenue that is available early on, intimately familiar with the particular setting in which the problems arose, and attuned to parties' interests and needs, may also be, under certain conditions, better able to uncover the root causes of the situation and the possible ways of addressing the broader problem.<sup>62</sup>

As stated above, adjudication has proven wanting in addressing the more subtle forms of discrimination that are

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<sup>57</sup> See Rabinovich-Einy, *supra* note 56, at 272–73.

<sup>58</sup> See generally Sturm, *supra* note 56.

<sup>59</sup> See Sturm, *supra* note 56, at 475–78.

<sup>60</sup> See Dauer, *supra* note 51, at 7–8.

<sup>61</sup> See DUBLER & LIEBMAN, *supra* note 42, at 14.

<sup>62</sup> See Sturm, *supra* note 56, at 461–62 (alluding to a more holistic and dynamic alternative to litigation).



typical of the new workplace.<sup>63</sup> Not only is the court, de facto, inaccessible to many victims of discrimination,<sup>64</sup> but even when accessible, courts have been ineffective in driving change. As opposed to the blatant and overt discrimination that was prevalent several decades ago and was relatively simple to uncover, new forms of discrimination are often a product of unintentional stereotyping, workplace culture, and subtle dynamics that determine hiring and promotion decisions.<sup>65</sup> In the hospital context, the structure of the already segregated workforce is reinforced by a communication culture that breeds stereotypical decision-making. Even though this phenomenon is often unintended, it cannot be mitigated absent a thorough and rigorous change in the organization, a goal which can be best attained, as this article suggests, by incorporating a new organizational language. The ability to uncover these occurrences and prescribe the means for dealing with a phenomenon that varies from one workplace to another, are well beyond the institutional capacity of courts.<sup>66</sup>

Similarly, medical malpractice cases, like discrimination claims, can be difficult to "name," "blame," and "claim"<sup>67</sup> in light of the informational and financial imbalances between the patient and her family on the one hand and the medical establishment on the other. In this context, however, unlike discrimination complaints, lawyers have been effective intermediaries in surmounting many of the barriers to the courts. Nevertheless, courts have proven inadequate in regulating physician conduct and reducing instances of malpractice.<sup>68</sup> Some have hypothesized that "the process by which medical liability is imposed may be the culprit. That

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<sup>63</sup> See *id.*

<sup>64</sup> See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 109 (1988) (stating that people who were discriminated against resist legal recourse because they fear being portrayed as victims by the legal system); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 637 (1980-81) (discussing the legal system's potential to amplify societal inequalities).

<sup>65</sup> See Sturm, *supra* note 56, at 468-69.

<sup>66</sup> See *id.* at 461-62.

<sup>67</sup> See Felstiner et al., *supra* note 64.

<sup>68</sup> See Dauer, *supra* note 51, at 7 ("[T]here is little if any correlation between incremental liability for medical accidents and incremental patient safety. Conventional analysis predicts that if doctors pay more when they make mistakes, they will be less likely to make mistakes. In fact, it doesn't seem to work that way.").

process is, conventionally, litigation and its associated procedures,"<sup>69</sup> while "[t]here is good reason to believe that well-crafted forms of mediation can achieve an effective link between today's medical error and tomorrow's patient safety."<sup>70</sup>

However, not all IDR systems are satisfactory to disputants or effective in their efforts to resolve individual disputes, discern patterns, and drive change. For the advantages and potential of IDR systems to be realized, this article suggests that a particular model should be adopted—one that draws on the transformative mediation model, handles a broad range of organizational disputes, and that is structurally accountable. The next two sections explain why each of these components is necessary.

### *B. The Need for Transformative Mediation of a Broad Dispute Range*

Internal dispute resolution systems can be overly narrow in that they focus on one type of dispute, for example, equal employment opportunity complaints,<sup>71</sup> but yet excessively broad in that they offer a range of internal dispute resolution avenues for stakeholders. Indeed, IDR literature has emphasized the need for internal choice of ADR mechanisms,<sup>72</sup> but has failed to recognize that choice has a price. When dealing with complex problems, a commitment to a particular form of ADR—that of broad transformative mediation—maximizes the ability of the internal unit to function on a preventative level. The broad transformative approach merges the goals of the transformative school (empowerment and recognition)<sup>73</sup> with the insights afforded by the narrative approach (understanding empowerment and recognition as taking place within the broader social and cultural setting and the realization that the mediator is not a detached outsider to the resolution effort). At the same time, grounding in the transformative school is significant

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 8.

<sup>71</sup> See, e.g., United States Postal Service, REDRESS Program, <http://www.usps.com/redress/> (last visited Oct. 23, 2006) (outlining an employment mediation option).

<sup>72</sup> See Mary Rowe, *Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?*, in WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE 21ST CENTURY 79, 87–88 (Sandra E. Gleason ed., 1997). See generally WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

<sup>73</sup> See *supra* notes 20–21 and accompanying text.

because of the organizational context, which is premised on relationships, and the concern over narrative mediation's broad mandate for mediator intervention.<sup>74</sup>

When parties are engaged in such a process, they deal with disputes more deeply and effectively. Root cause problems are exposed and parties go through an experience in which they learn something about themselves, how they interact with others, and how they deal with problems. At the same time, they learn about the "other"—stereotypes are questioned, communication short cuts are exposed, differences are discussed, and tolerance is fostered. This type of process has several advantages over other forms of dispute resolution. First, because the process digs deep below the surface of problems and exposes underlying root causes, it can provide more effective and sustainable resolutions and it is more likely to uncover patterns and trends that would not be exposed through more "shallow" processes that take problems at face value.

In addition, the skills developed when experiencing transformative mediation may have a spillover effect that can transform the organizational communication culture and further prevent disputes from arising.<sup>75</sup> As is evident from the brief description of internal and external disputes in hospitals, many of these conflicts are related to the ways in which staff and patients communicate and patterns of information gathering and analysis by decision-makers in the hospital settings, patterns that can perpetuate unconscious biases and stereotyping. The high-pressure environment in which critical decisions need to be made under time constraints has justified a hierarchical structure. Such a setting encourages a communication culture in which there are clearly right and wrong answers, positions are exchanged, and understanding of the other side is assumed and

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<sup>74</sup> This broad understanding of the transformative model is described in an article on the newly established Israeli Equal Employment Opportunity Commission, co-authored by Dr. Faina Milman and myself. There we justify our choice to remain anchored in the transformative model based on the significance we attach to the following features, associated with the transformative model: (1) the emphasis on relationship, which is particularly important in the organizational context; (2) the goals of empowerment and recognition, which allow organizations and the individuals operating within them to act on a preventative level (beyond the resolution of individual disputes); and (3) the constrained role envisaged for mediators.

<sup>75</sup> See James R. Antes et al., *supra* note 29, at 430.

rarely reflected and validated. When we take "short cuts," make assumptions, and fill in informational gaps, we end up stereotyping (placing information in familiar categories) and are guided by cognitive biases.<sup>76</sup> Cognitive biases, while allowing for quick action, often generate mistakes or misunderstandings, and, as a result, problems and disputes. Thus, an organization in which communication is one-sided, partial, and linear is also one in which conflict is prevalent, or, in other words, is an ailing organization.

For the system to be most effective, it should handle as broad as possible a range of disputes,<sup>77</sup> exposing a high number of stakeholders in a wide variety of contexts to the tools embodied in transformative resolution writ broad, and allowing the dispute resolution unit to draw on a large pool of complaints in identifying problematic patterns.<sup>78</sup>

The potential contribution of ITR is enormous. These advantages cannot be obtained through litigation or court-referred ADR. It is the insider, pre-litigation position that drives many of the benefits of these internal systems, but it is also the source of much discomfort, critique, and outright objection to such systems.

### C. *Beyond IDR: Addressing the Perils of Privatization of Dispute Resolution*

What happens when the resolution of disputes, particularly those with a clear "public" angle such as discrimination complaints, medical malpractice claims, and bioethical dilemmas, is siphoned off to private, confidential forums? Do we want to

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<sup>76</sup> See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995) (describing the ways in which stereotyping and heuristics, which are designed for simplifying our perceptual environment by allowing us to act based on partial information, also serve to distort our perception and foster discrimination). For a general description of cognitive biases that affect the ways in which we understand information and make decisions, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

<sup>77</sup> See Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 369-70 (2001) (explaining why choice of transformative mediation is necessary in IDR systems in order to generate a change in workplace culture that extends beyond the resolution of individual disputes).

<sup>78</sup> See *supra* text accompanying notes 55-56.

encourage the institution of internal dispute resolution units that would further erode the public realm?

Indeed, the ADR movement was fiercely criticized precisely on these grounds by Fiss,<sup>79</sup> Luban,<sup>80</sup> Resnik,<sup>81</sup> and others who have pointed to the need for development of law by courts on the one hand and the lack of quality control mechanisms in ADR on the other. These and other critics have claimed that the mass referral of cases to ADR, despite its rhetoric of access to justice for the poor, has actually served to harm the weaker segments of society. Nader<sup>82</sup> highlighted the fact that the ADR revolution was launched soon after disempowered groups and consumers began to successfully use courts in their struggle for civil rights and economic change in the 1960s. A similar and no less vehement attack was voiced on IDR mechanisms by Edelman, Erlanger, and Lande<sup>83</sup> who claimed that internal dispute resolvers tend to adopt a managerial perspective and thus transform what would be characterized as a civil rights claim in the formal legal system into a dispute that is the product of miscommunication or cultural differences. The question arises, then, in what way have ADR mechanisms been particularly harmful to disputants belonging to "weak" groups and how is this different from inequities that have plagued the overloaded and exorbitant court system?<sup>84</sup>

The source of the problem, it seems, lies in what I have termed elsewhere as the "accountability dilemma."<sup>85</sup> Although this dilemma is typical of nearly all ADR processes, it is most acute in the mediation context. The problem is exacerbated in IDR, where the neutral third party is typically an employee of

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<sup>79</sup> See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1086 (1984).

<sup>80</sup> See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626-27 (1995).

<sup>81</sup> See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 226 (1995).

<sup>82</sup> See Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 13 (1993) (comparing mediation to a form of dance between oppressor and oppressed).

<sup>83</sup> See Edelman et al., *supra* note 4, at 497-98 (discussing IDR's potential impact on the rights of minority and female employees).

<sup>84</sup> See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 125 (1974) (demonstrating that "wealthy" entities tend to reap the benefits of ADR).

<sup>85</sup> See Rabinovich-Einy, *supra* note 56, at 256.

the organization, which, in turn, has an interest in the resolution of disputes, either as a direct party or indirectly as the employer of the disputing parties.

The accountability dilemma stems from the fact that the basic and most essential features of mediation are in tension with the conditions for generating accountability. It is therefore extremely difficult to ensure that mediation is conducted in a fair and effective manner. Mediation is attractive and effective because of its confidential and flexible nature, but these traits are in direct tension with the basic tenets of accountability—transparency and structure.<sup>86</sup> Despite its consensual and (typically) voluntary nature, mediation can be a locus in which power is applied by the mediator or another party. The accountability measures familiar to us from litigation (relying on rules to limit judicial discretion and on transparency to reveal wrongdoing, errors, and inequities in the judicial process and its outcome) are inapplicable.<sup>87</sup> It is extremely difficult to limit mediator discretion through rules and to conduct an ex-post review of the mediation in light of the limited and thin data collected on mediation sessions.<sup>88</sup>

Critics have consistently pointed out that the lack of accountability measures has harmed primarily weak parties, particularly when they are engaged in mediation efforts with stronger, more knowledgeable, and wealthier parties.<sup>89</sup> Under such circumstances, where there are few procedural safeguards, stronger parties can take advantage of their counterpart's ignorance of alternatives or their susceptibility to economic pressures to settle. When there is no monitoring, a dominant mediator's interventions could unequally impact a party who is unrepresented and blindly accepts a mediator's evaluation. At the same time, critics have ignored or belittled the significant benefits offered through mediation, many of which cannot be replicated in formal settings and have, to a large extent, failed to provide a framework for addressing these difficulties in the face

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<sup>86</sup> See *id.* at 260–68.

<sup>87</sup> See *id.* at 266.

<sup>88</sup> See *id.*

<sup>89</sup> See NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 47 (Laura Nader ed., 1980); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375–91 (1985) (discussing prejudice and ADR); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1561 (1991).

of the ever expanding privatization of the dispute resolution landscape.

The dilemma has seemed impossible to solve: forego the benefits of mediation or conduct a process in which there are very few checks and balances. But, what has seemed like an insoluble problem can in fact be mitigated by questioning common assumptions and practices in the mediation community. Confidentiality and flexibility have been broadly interpreted by providers of mediation services leading to a dearth of information collection on mediation sessions, even internally, and few efforts to enhance consistency and conduct quality control efforts.<sup>90</sup> However, under alternative, more nuanced understandings of both confidentiality and flexibility, a new paradigm for accountability in mediation could be developed, that of structural accountability.<sup>91</sup>

Structural accountability revolves around information collection, analysis, and external monitoring. Under the structural accountability paradigm, accountability is generated through bottom up efforts for information collection and analysis (that allow for quality control and consistency-enhancing), structured incentives for mediators to perform well and improve, and external monitoring of mediator and provider performance and of the overarching goals set by the provider.<sup>92</sup> Thus, providers of mediation services can adopt practices that promote internal information collection on mediation proceedings (through simultaneous information collection by observers, allocating caretakers of information, and institutionalizing occasions for reviewing the information and learning from it) and encourage consistency by mediators (by requiring co-mediation, conducting periodic reviews in which detailed observer logs are reviewed, and devising flexible mediation standards). In fact, some in the ADR field have already begun experimenting with systems incorporating some of the elements of structural accountability.<sup>93</sup>

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<sup>90</sup> See Rabinovich-Einy, *supra* note 56, at 267-68.

<sup>91</sup> See *id.* at 268-69 (describing structural accountability); Sturm, *supra* note 56, at 463.

<sup>92</sup> See Rabinovich-Einy, *supra* note 56, at 268-69; Sturm, *supra* note 56, at 463.

<sup>93</sup> See Rabinovich-Einy, *supra* note 56, at 286-90; Sturm, *supra* note 56, at 499-509 (discussing such an attempt by Intel Corporation).

It is the combination of the broad transformative mediation model and structural accountability measures that can generate fair and effective ITR systems while maximizing the benefits of internal mechanisms. As stated above, the transformative model is most likely to result in spillover effects, educating parties on their own capabilities for handling disagreements and conflict situations and being able to recognize and accommodate difference. Through transformative mediation, parties learn to question their own assumptions and understanding, thereby improving future communication and reducing friction. Furthermore, in the transformative mediation school, mediator bias is controlled (compared to other mediation models) because of the restrained role transformative mediators play in the resolution of disputes.<sup>94</sup>

But, even the constrained role envisaged for transformative mediators leaves some room for mediator power exertion and, perhaps more troubling, domination and manipulation by a more powerful party who is not genuinely engaged in the resolution effort. This is where accountability mechanisms come in.

Accountability measures, internal and external, are essential for ITR systems to deliver their promise, by ensuring that: (1) ITR units function equitably on an individual level (that mediators are competent, that they indeed follow the transformative model, that there was informed consent by parties, etc.), and (2) that the ITR system is able to detect and address systematic problems on two levels—relating to the organization and the ITR unit. With respect to the ITR unit, it needs to examine the impact of its intervention on particular groups of disputants to ensure that there is no systematic bias (against women, nurses, etc.). On an organizational level, the ITR unit should strive to discern problematic patterns in the hospital's functioning, such as the need for special training for certain positions or different work allocation in various departments.

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<sup>94</sup> Transformative mediators may not evaluate and should not raise options for resolution; they should constantly seek to drive parties towards empowerment and recognition by orienting parties to their own agency and supporting the parties' own decision-making. See Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1006 (2004).



Given the benefits of ITR systems and their potential for enhancing organizational learning, the question arises why hospitals have refrained from adopting ITR systems voluntarily. The next section addresses this question in the Israeli context, and offers initial thoughts on what form should encouragement for ITR systems wear.

### III. ITR IN ISRAEL: ENSURING ACCOUNTABILITY AND EFFECTIVENESS

Despite a generally high regard for the quality of medical care in Israel, Israeli hospitals are ailing organizations; they are high-pressure sites in which communication is often partial and broken, resulting in frequent mistakes, misunderstandings, and wrongdoing. At the same time, because of breakdowns in both formal and informal checks on the operation of hospitals, the status quo has been one in which hospitals operate in a chronic state of ailment. Formal monitoring is deficient because the Ministry of Health serves simultaneously as the regulator, operator, and monitor of hospitals. Most monitoring is conducted ex post, on a one-shot basis following some large scale scandal.

Informal quality controls in the form of patient complaints, organizational reputation, and professional networks have also been deficient. The average patient, despite democratization in medical knowledge through the Internet and the ability for voicing public opinion online, has significantly less knowledge (certainly about the inner workings of a particular hospital), power, and resources than the medical establishment and is therefore often unable to detect and report a problem. Patients who are one-shot users of these services have few incentives to complain in minor cases while patients who require ongoing care may be hesitant to complain when they suspect they will require ongoing assistance from a local hospital's staff. Hospital reputation is typically derived from the acquisition of "stars" on its medical staff, while very little information is actually disclosed on performance in terms of various operations and interventions conducted within the hospital. Finally, there are practically no proactive quality control measures by hospitals in place and information collection and analysis are institutionally discouraged.

A law on patient rights from 1996<sup>95</sup> (the "Patient Rights Law") was supposed to spur dramatic change. It established rights for patients, most notably a universal right to appropriate medical treatment in terms of quality of care and bedside manners,<sup>96</sup> as well as duties and obligations of healthcare institutions. A healthcare institution may not discriminate in medical treatment,<sup>97</sup> must document and share certain information,<sup>98</sup> and must adopt certain quality control measures. Among these measures, there is a duty to nominate a person in charge of ensuring patient rights<sup>99</sup> and to establish ethics committees,<sup>100</sup> inspection committees,<sup>101</sup> and quality control committees.<sup>102</sup> In addition, a position of an Ombudsman for the Ministry of Health (the "Ombudsman") was created to investigate complaints (by patients, family members and others) regarding quality of care. The Ombudsman has been granted several investigatory tools (including the establishment of an inspection committee under the Patient Rights Act), and has the power to punish medical staff and take other steps that are necessary for the improvement of the healthcare system as a whole.<sup>103</sup>

However, the above measures have been critiqued as weak and ineffective.<sup>104</sup> Inspection committees are only established after the fact and in "extreme" cases (which are not defined in the law). The committees have been criticized for their soft scrutiny, lack of enforcement of decisions, and the absence of a preventative perspective.<sup>105</sup> Doctors are reluctant to participate

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<sup>95</sup> Patients' Rights Act, 1996, S.H. 5756.

<sup>96</sup> See *id.* § 3.

<sup>97</sup> *Id.* § 4.

<sup>98</sup> *Id.* §§ 17-18.

<sup>99</sup> *Id.* § 25.

<sup>100</sup> *Id.* § 24.

<sup>101</sup> *Id.* § 21.

<sup>102</sup> *Id.* § 22.

<sup>103</sup> See REPORT BY THE INSPECTION COMMITTEE OF THE MINISTRY OF HEALTH TO THE HEAD OF THE EMPLOYMENT, WELFARE, AND HEALTH COMMITTEE OF THE KNESSET 3 (June 16, 2004), available at <http://www.med-law.co.il/imgs/uploads/mador%20vaada/bedika%20knesset.doc> [hereinafter FINAL REPORT ON INSPECTION COMMITTEES].

<sup>104</sup> See AMNON CARMİ, HEALTH LAW 818 (2003) (stating that there was insufficient allocation of funds for ensuring execution and application of the law).

<sup>105</sup> See Knesset Center for Research and Information, Background Paper for Discussion: Inspection Committees in the Ministry of Health (Feb. 2, 2004) (submitted to the Committee on Employment, Welfare, and Health, on file with author).

in committees (a task for which they receive no remuneration), there are no public representatives on the committees, and there is hardly any systematic learning for the prevention of future mishaps.<sup>106</sup> In addition, sanctions under the Patient Rights Act were established only for acts of discrimination in medical treatment or for breach of certain duties related to information recording and sharing, but not, for example, for the failure to nominate a person in charge of complaints.<sup>107</sup> Aside from a general statement that the hospital director general is in charge of administering the requirements under the Patient Rights Act, there is no related sanction. This is all the more troubling since in Israel there are no term limits for hospital director generals who can, and often do, serve in such position for many years, even several decades. Finally, the Ombudsman has been criticized for the slow pace of inquiries and his lack of enforcement powers.<sup>108</sup> He seems to enjoy little credibility and trust, as evidenced in the number of complaints he has received (which remained static over a period of several years while the number of legal claims has continued to rise).<sup>109</sup>

It seems clear, then, that change is needed. At the same time, it seems unlikely that hospitals will adopt ITR systems, despite the benefits they afford, absent a push from the legal system. The main reason for this has to do with the tension between structural accountability and the broader legal environment in which hospitals operate. Structural accountability is based on information gathering and analysis, while Israeli hospitals are actively discouraged from gathering information on past mistakes and mishaps. Where hospitals have conducted internal consultations for learning and improvement purposes, the information could have been subpoenaed, exposing hospitals and doctors to liability.<sup>110</sup>

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<sup>106</sup> See FINAL REPORT ON INSPECTION COMMITTEES, *supra* note 103, at 2-3.

<sup>107</sup> See Patients' Rights Act § 28(A).

<sup>108</sup> See FINAL REPORT ON INSPECTION COMMITTEES, *supra* note 103, at 2-3.

<sup>109</sup> See *id.* at 11.

<sup>110</sup> The Patients' Rights Act offers more protection for information collected by inspection committees than was offered prior to its promulgation. The protocols of the sessions of inspection committees, however, receive only partial immunity from disclosure to a patient or their family members. Courts have interpreted this requirement unevenly, rendering somewhat contradictory decisions regarding the conditions under which disclosure would be granted. A recent Israeli supreme court decision, however, decided in favor of immunity and offered a list of flexible standards that should guide future courts' decisions of whether to rule for disclosure

Expensive video equipment that has been installed in operation rooms has never been used and CPCs (clinico-pathological conferences) are rarely conducted.<sup>111</sup> Individual hospitals and hospital director generals, then, have no incentive to launch initiatives to study their own performance—both in terms of the quality of patient care and in terms of the equity of their employment practices—because such examination could only serve to their detriment in formal proceedings. It turns out that there is often a tension between the individual success in litigation and the systematic goal of preventing problems from occurring. As more and more individuals succeed in obtaining hefty awards in court, these successes serve to further deter hospitals from preserving information that is essential for preventing future problems.

A second obstacle to the evolution of ITR is the tension between the broad transformative mediation model and the management culture of many organizations that are focused on short term, tangible gains. This is particularly true in Israel where both management styles<sup>112</sup> and the local experience with mediation<sup>113</sup> have served to make mediation available only post-litigation and in its evaluative form. Evaluative mediation fails to address the root cause of problems and cannot bring the type of deep, long-term change that is required to cure organizational ailment.

How can we address organizational ailment? What can be done to encourage improvement and learning in the hospital environment? How do we ensure better quality of care for patients, improved working conditions for hospital employees, and more accountable decision-making on bioethics committees? The answer, as I have suggested throughout this article, may lie in the establishment of an ITR system—an internal conflict

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or immunity while emphasizing the significance of immunity for ensuring improvement in the delivery of public health services. See 4708/03 Chen v. Israel—Ministry of Health [2005] (unpublished, 7.11.2005), available at [http://law.haifa.ac.il/lawatch/lawatch\\_files/2006a\\_bdika.htm](http://law.haifa.ac.il/lawatch/lawatch_files/2006a_bdika.htm). Despite clarifying the legal situation somewhat, the decision still leaves much room for interpretation and its impact on the medical world has yet to be seen.

<sup>111</sup> This information was conveyed in confidential conversations with current and former hospital administrators in Israel. See also Ran Resnik, *Cause of Death Unknown*, HAARETZ, February 18, 2007, at B3 (citing a report according to which in recent decades there's been a drastic decline in CPCs in Israeli hospitals).

<sup>112</sup> See *supra* note 38 and accompanying text.

<sup>113</sup> See *supra* note 26 and accompanying text.

management unit that follows the broad transformative model and is premised on the institution of rigorous accountability measures in a confidential and flexible environment.

One way to promote the ITR model would be to refurbish existing roles and institutions in the Israeli healthcare arena. Under the Patient Rights Act, there is a requirement to designate a "person in charge." This position, allocated to an employee of a medical institution, is that of an internal Ombudsman. Hospitals need to be given incentives to actually create and staff this position with a full time, independent employee whose potential conflict of interests is minimal. The employee serving this position could also fulfill another requirement of designating an employee in charge of sexual harassment complaints under the Israeli law for the prevention of sexual harassment.<sup>114</sup> The recent establishment of an Equal Employment Opportunity Commission in Israel,<sup>115</sup> which at least on paper has "teeth," could lead to a more rigorous enforcement of Israeli anti-discrimination laws including the requirement for a person in charge of sexual harassment complaints. The breach of this enforcement, under current Israeli law, could result in the imposition of significant fines on an employer of over 25 employees. If this turns out to be the case, it would be in hospitals' interests to combine their responsibilities under both laws and designate a single ombudsman, who could also serve as a facilitator of the work of ethics committees (a role in which mediators have proven highly instrumental in the United States).<sup>116</sup>

Whether hospitals encourage their ombudsman to adopt a preventative model for addressing internal institutional problems or whether they address complaints on an individual basis, failing to take advantage of this channel for institutional learning, is an open question. What is clear is that further incentives are necessary if hospitals are to be driven towards a preventative approach; information collection and analysis need

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<sup>114</sup> See Prevention of Sexual Harassment Law, 1998, S.H. 5758, § 7 (discussing employees' general responsibilities in this regard); *id.* § 4. I am currently engaged in another research project together with Dr. Faina Milman in which we study the potential of these requirements, among other things, to impact the norms governing the Israeli workplace.

<sup>115</sup> Equal Opportunity in Employment Law, Amend. X, 2005, S.H. 5766.

<sup>116</sup> See generally DUBLER & LIEBMAN, *supra* note 42 (analyzing mediation in the medical context).

to be encouraged (by offering exemption from liability or ensuring confidentiality of information in certain cases) and some form of external monitoring that yields sanctions and rewards for hospitals (in terms of funding, reputational ranking, etc.) must be conducted.<sup>117</sup>

#### CONCLUSION: PROSPECTS FOR THE FUTURE

This article calls for a transformation in the delivery of healthcare services in hospitals: not a transformation in hospital layout or in the nature of treatment given, but in their communication culture. Communication affects all levels in which hospitals and their staff operate, internally and externally. Such a change would not only make hospitals a more agreeable place for patients and a more pleasant environment for employees, but would actually help these institutions improve the quality of care provided, meet legal requirements regarding patient and employee rights, and ensure that issues that implicate the public interest are resolved in a satisfactory manner. Drawing on the ADR, IDR, and accountability literature, this paper has advanced a new approach to the resolution of disputes in organizations—I<sup>TR</sup>. Adopting an I<sup>TR</sup> system as described in this article can transform hospital treatment of complaints and problems (as well as successes) from individual and ad hoc solutions into a preventative, systematic methodology.

Whether this transformation will indeed take place is questionable, some may say doubtful. There are, however, signs that some institutions are already realizing the need for such a change. An experiment for developing a capacity for dealing with disputes, conflicts, and problems, is currently being planned at one Israeli hospital.<sup>118</sup> This project is only in the pre-pilot stage, but the need for such a perspective has been deeply recognized, even at this early phase, by all hospital employees involved. This limited experience, together with pressures created by the public's growing access to information on medical mishaps, may very well drive change from the bottom up. Nevertheless, absent

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<sup>117</sup> See Sturm, *supra* note 56, at 537–53 (describing obstacles that exist preventing solutions to problems in the workplace).

<sup>118</sup> I am engaged in this project together with a group of transformative mediators led by Ms. Amira Dotan and Ms. Hanna Kotzer-Sapir.

active direction and monitoring from above, these experiments will not spread and the quality of such efforts cannot be ensured.